The learned Magistrate also framed a second charge under section 12(1) of the Motor Vehicles (Driving Offences) Proclamation of failing to stop after an accident. The respondent pleaded guilty to both charges. He was, therefore, convicted and on the first charge was fined $1,500 or three months' imprisonment in default, and on the second charge was fined $200 or one month's imprisonment in default.

The learned Deputy Public Prosecutor submitted that in a case such as this the accused should not have been given the option of a fine but that a sentence of imprisonment should have been imposed.

In his grounds of decision the learned Magistrate said :—

"However the only proper object of any fine or imprisonment in a case of this nature is to provide a deterrent to others and the sentence should not aim at retribution. I considered, moreover, that the sentence imposed should be related to the accused's act in driving in a dangerous manner rather than to the tragic, but largely fortuitous consequence that two persons had been killed. I observed that the maximum penalty provided for a first offence of dangerous driving under the Motor Vehicles (Driving Offences) Proclamation is a fine not exceeding five hundred dollars or imprisonment for a term not exceeding six months. The accused, being a soldier in the British Army, was not highly paid. It was his first offence."

The learned Magistrate appears to me to have erred on a matter of principle. There is no analogy between the offence of dangerous driving and an offence under section 304A. Causing death by a rash act is a form of homicide and is roughly the equivalent of the English offence of manslaughter by negligence. It is the causing of death which is the main ingredient in the offence. A person may be guilty of dangerous driving, although he has caused no damage to anyone.

In considering what sentence should be imposed I found some difficulty at first sight in distinguishing the present case from that of *Public Prosecutor v. Sayer*[1] quoted above in which a sentence of 16 months' imprisonment was imposed. In *Sayer's case*[1], however, the vehicle driven was a very big Military lorry and the rashness consisted in driving this vehicle at a high speed in one of the most congested streets of Kuala Lumpur at a very busy time. In the present case the respondent was driving a smaller vehicle and was driving along a stretch of straight road where speed in itself does not necessarily constitute rashness or negligence. The rashness in this instance consisted in driving the vehicle so fast and in such a manner as to be unable to avoid an innocent citizen walking quietly with his bicycle on the side of the road at a time when there was no other traffic to make it necessary to drive anywhere near him.

I do not think it was really necessary for the learned Magistrate to add the additional charge because on a charge of causing death by a rash act I am of opinion that the failure to slow down or stop was admissible evidence on the main charge to indicate the general state of mind of the respondent.

It has been held by the Court of Appeal in two consecutive decisions (*Cheow Keok v. Public Prosecutor*[2]; *Public Prosecutor v. Mohamed Salleh bin Hitam*[3]), that the same high degree of negligence is necessary to support a conviction under section 304A as is required to support a conviction for manslaughter by negligence in England. In *Andrews v. Director of Public Prosecutions*[4] the test laid down in *Rex v. Bateman*[5] was approved to the effect that in an indictment for manslaughter the negligence of the accused must go beyond a mere matter of compensation between subjects and show such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment. I am of opinion that this degree of rashness was clearly shown in this case.

Whilst I am far from laying down that a sentence of imprisonment must always be imposed in these cases it seems clear that once the degree of rashness or negligence above described has been proved there cannot be many cases in which a sentence of a fine would be an adequate punishment. Bearing this in mind and taking into consideration all the circumstances in the present case I quashed the sentence imposed by the learned Magistrate and substituted a sentence of five months' imprisonment on the first charge and a fine of $1 on the second charge.

Order accordingly.

LOKE SOO HAR v. PUBLIC PROSECUTOR.

[C. A. (Matthew C.J., Wilson and Abbott JJ.)
May 24, 1954]

[K. L. — Criminal Appeal No. 23 of 1954]

Criminal trial — Identification — Use of photographs of known pickpockets to identify accused — Suggestion that accused is a person of bad character.

In this case at the trial evidence was given that in the course of Police investigation a number of photographs were shown to a witness and that the witness identified the accused from them. In the course of the evidence the Police Inspector used the following words "I showed him 4 or 5 photographs. They were photographs of known pickpockets living in the area".

Held: (1) the evidence of the Police Inspector coupled with the evidence of identification must have left the jury with the impression that the appellant was a known pick-pocket and a person of bad character and therefore such evidence should not have been admitted: (2) as the evidence of identification played an important part in the case the Court was unable to say that had such evidence been excluded, the jury must inevitably have arrived at the same verdict and therefore the conviction must be quashed.

Case referred to :—

(1) *R. v. Redd* 17 C.A.R. 36.

CRIMINAL APPEAL.

Lim Kean Siew for the appellant.

E. Brown (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Abbott, J. (delivering the judgment of the Court) : — The appellant in this case was convicted of murder by a jury in Penang, and was sentenced to death. It is not necessary to recount the evidence given in the lower Court, for only one matter calls for consideration. With a view to establishing the identity of the appellant during the course of police investigation, several photographs of various persons were shewn to the first prosecution witness Ang Ah Bah, who in cross-examination said :—

"I first identified accused when the Inspector had shown me some photographs".

In the course of his evidence-in-chief, the Police Inspector used the following words :—

"I showed him 4 or 5 photographs. They were photographs of known pick-pockets living in that area."

These two pieces of evidence must have left the jury with the impression that the appellant was a known pickpocket and a person of bad character. In our view, the learned trial judge should either have discharged the jury and commenced the trial afresh, or have warned them wholly to disregard that part of the evidence.

Identification was a vital issue in this case, and we have to ask ourselves whether the evidence so admitted affected the minds of the jury in arriving at their verdict. In *R. v. Redd*[1], Avory J., in the course of delivering the judgment of the Court, said (at p. 39) :—

"It has been frequently laid down that such a conviction can only be upheld if the jury would inevitably or must inevitably have come to the same conclusion."

As identification played an important part in the case, we find ourselves unable to say that, had this evidence been excluded the jury must inevitably have arrived at the same verdict. In the circumstances, we quash the conviction and sentence and order a re-trial.

Re-trial ordered.

Solicitor for the appellant: *Lim Cheng Ean.*

PUBLIC PROSECUTOR v. NG FAH.

[C. A. (Mathew, C.J., Wilson & Abbott, JJ.)
May 26, 1954]

[K. L. — Criminal Reference No. 5 of 1953]

Criminal Procedure Code (Cap. 6), s. 399(i) — Admissibility of report of Chief Chemist.

In this case the learned Magistrate had refused to admit as evidence the Report of the Chief Chemist holding that as the provisions of s. 399(i) of the Criminal Procedure Code had not been complied with, the report was inadmissible. The Chief Chemist was called to give evidence and as a result the accused was acquitted. The matter was referred to the Court of Appeal as a Reference under s. 34 of the Courts Ordinance.

Held: (1) the learned Magistrate was right in holding that the report of the Chief Chemist was inadmissible as the provisions of s. 399(i) of the Criminal Procedure Code was not complied with; (2) as apart from the Chemist's report there was no evidence to prove that the substance the subject matter of the charge was tin ore, the accused was rightly acquitted.

Case referred to :—

(1) *Ng Yee v. Public Prosecutor* (1953) M.L.J. 250.

CRIMINAL REFERENCE.

E. Brown (Federal Counsel) for the appellant.

Nancy Yeap for the respondent.

Mathew, C.J. (delivering the judgment of the Court) : — This case came before us as a Reference under section 34 of the Courts Ordinance, and was heard as an appeal from the decision of the learned magistrate.

The point on which our decision is required has already been decided in *Ng Yee v. Public Prosecutor*[1].

The learned magistrate refused to admit as evidence the Report of the Chief Chemist, holding that the provisions of section 399(i) of the Criminal Procedure Code not having been complied with, the Report was inadmissible.

No decisions on this point were cited to the learned magistrate. The prosecution then applied for an adjournment in order to call the Chief Chemist, which was granted. On the day appointed for the resumed hearing, the prosecution closed their case without calling further evidence. The prosecution thus acquiesced in the rejection of the Chemist's Report, and did not attempt to remedy their failure to prove that the substance the subject matter of the charge was tin-ore.

As the Deputy Public Prosecutor did not argue in support of the appeal against the decision of the magistrate to acquit, the appeal was dismissed.

Appeal dismissed.

Solicitors for the respondent: *Hogan, Adams & Allan.*